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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~557~~ 17

UNITED STATES OF AMERICA,

Respondent,

—against—

JOSEPH PAUL LaPICCOLO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(Law Press, Inc., 2 Rector St., N. Y. BE 3-6900)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Joseph Paul Lo Piccolo, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 2nd day of October, 1959, affirming in part a judgment of conviction of the petitioner in the United States District Court for the Southern District of New York, dated July 31, 1958.

Basis of Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit which is sought to be reviewed herein was made and entered October 2, 1959. This judgment of affirmance affirmed in part the judgment of conviction in the United States District Court for the Southern District of New York, which adjudged the petitioner herein guilty of Count 5 of an indictment charging a conspiracy to violate the Narcotic Laws of the United States, Sections 174 and 175 of Title 21, United States Code, and wherein petitioner was sentenced to a term of twenty years on said conviction. The said Court of Appeals in the same judgment by a divided Court reversed a judgment of conviction against the petitioner herein finding him guilty of Count 2 of said indictment, which charged the petitioner with receiving, concealing, selling and facilitating the transportation, concealment and sale of narcotics, in violation of Title 21, Sections 173 and 174, United States Code. Petitioner was sentenced to a term of twenty years on each count, said sentences to run concurrently.

Petitioner seeks a writ of certiorari to review so much of the judgment of the United States Court of Appeals which affirmed the judgment of conviction under Count 5, the conspiracy count in said indictment.

The jurisdiction of the United States District Court for the Southern District of New York was invoked in view of the fact that the crimes charged were violations of the Federal Laws allegedly committed within the Southern District of New York. The particular statutes involved are Sections 173 and 174 of Title 21, United States Code.

Statutes Involved

United States Code, Title 21, Section 173:

"§ 173. **Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.** It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported. * * *

"§ 174. Same; penalty; evidence. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells; or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

(*Amendment enacted July 18, 1956, effective on July 19, 1956.*)

An application was made to Mr. Justice Harlan of this Court for an order granting the petitioner a thirty-day extension of time within which to file a petition for a writ of certiorari. This application was granted on or about October 29, 1959, and petitioner's time within which to petition for a writ of certiorari was extended to and including the 1st day of December, 1959.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules, and Title 28, United States Code, Section 1254(1), on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

Certiorari is further sought on the ground that the United States Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal law in conflict with applicable decisions and contrary cases of law, has decided an important question of Federal law which should be clarified and made more definite and certain by this Court, has decided Federal questions of substance not theretofore determined by this Court; and or has decided such questions in a way probably not in accord with applicable decisions of this Court and with other circuits.

Opinion Below

The opinion of the United States Court of Appeals, which affirmed in part the judgment of conviction of the petitioner entered in the United States District Court for the Southern District of New York is reported in 270 Fed. (2d) ; Report No. 206 of the United States Court of Appeals for the Second Circuit Reports, October Term 1958. A copy of said opinion has been forwarded under separate cover by petitioner's co-defendants in said action, who are likewise petitioning for a writ of certiorari, and the Court is respectfully referred to this opinion which is incorporated herein by reference.

The aforementioned opinion of the United States Court of Appeals and the judgments based thereon were dated and entered the 2nd day of October, 1959 and affirmed in part the judgment of the United States District Court for the Southern District of New York by reversing the judgment of conviction of petitioner by a divided Court on Count No. 2 of the indictment herein which charged petitioner and others with receiving, concealing and facilitating the transportation, concealment and sale of narcotics under Title 21, Sections 173 and174 of the United States Code, and affirmed that part of the judgment which convicted petitioner on Count No. 5, which charged him and others with the crime of conspiracy to violate the Narcotic Laws of the United States, in violation of Sections 173 and 174, Title 21, United States Code. Petitioner was sentenced to a term of imprisonment for a period of twenty years on said counts 2 and 5, the said sentences to run concurrently.

Questions Presented for Review

(1) Whether the evidence against petitioner at the trial was sufficient to justify the conclusion beyond a reasonable doubt that petitioner was engaged in a continuing conspiracy to violate the Narcotic Laws of the United States in violation of Sections 173 and 174 of Title 21 of the United States Code.

(2) Was there a denial of due process in failing to make available to defense counsel Grand Jury testimony of Government witnesses?

(3) Was there a denial of due process by the improper receipt of evidence against petitioner after he had rested his case?

The Trial Evidence

The Government's Case

The Preconspiracy Testimony (February to October, 1957)

In February 1957, Agent Michael Picini met the defendant James Santore in Philadelphia (229):* The agent told Santore that he had been referred to him by a friend from Baltimore. After some discussion of possible mutual acquaintances, among whom was a Harry Riccobene from Philadelphia and a mysterious Mr. "T" from Baltimore and New York, Santore inquired how much heroin the agent wanted (230, 309-10).

Several weeks later, Santore introduced the agent to one Frank Valle (233-4). The three men repaired to the ba-

* References are to pages in the Record on Appeal.

ment of Valle's luncheonette where the agent discussed with Valle the purchase of narcotics (234). In the ensuing days other discussions followed which culminated in the purchase by Picini of six ounces of heroin from Santore (236-41).

Another purchase was made in April 1957 in which Picini and a second agent, James Marshall, played the role of purchasers, and in which Santore again acted as a middleman procuring the narcotics from some unknown source (242-48).

No further transactions occurred until July when Santore introduced the agents to one Frank Malfi (249). As a result of this meeting two more purchases of heroin were made by the agents in July and August and payments totalling over $9000 were made to Malfi and Santore (249-56).

In the early weeks of October a series of discussions took place between Agents Picini, Marshall, and Santore in the course of which Santore offered to introduce the agents to his "New York connection" in return for a payment of $2000 (69-70, 73, 256-7).

On October 16, 1957, Santore introduced the agents to the defendant Casella, falsely representing him to be a "New York" connection (74-6). Casella offered to obtain unlimited amounts of heroin at a price of $11,000 per kilogram (76-7).

The Events of October 21st

At about 4:30 in the afternoon of October 21st, the defendants Santore, Casella, and D'Aria were observed together in front of the Hotel Lexington (Schafer 363).

About one hour later Agent Marshall arrived in New York, met Santore and received a package from him in a parking lot at 48th St. and Lexington Avenue (Marshall 80-1, Coyne 831). Marshall informed Santore that he had no money with him, ascribing this circumstance to the fact that his partner Picini had been suddenly taken sick (Marshall 80-1).

Marshall, Santore and Casella dined at a nearby restaurant, and Marshall endeavored to persuade Casella—who wished to cancel the entire transaction—to permit the sale to go forward on consignment (Marshall 81-4). As a kind of credit reference, Marshall falsely informed Santore and Casella that he and Picini were the part owners of a $75,000 motel, and not "fly-by-night individuals" (Marshall 84).

Leaving his dinner companions, Casella proceeded to the Paddock Bar where he met D'Aria and Massi (Costa 489).

With a federal agent standing one inch away, Casella, D'Aria and Massi held a conversation (Costa 489-91). In the course of the discussion Casella is alleged to have informed the others that, "One of them got sick and his partner came alone" and that "It [the package] is in the trunk of their car on the East Side" (Costa 495, 499-500).

At a somewhat later time, Casella rejoined Santore and Marshall, informing the agent that he could take the drugs provided payment was made by the following Wednesday (Marshall 86).

The balance of the hundred or more pages of testimony regarding the comings and goings of Santore, Casella, D'Aria and Massi on the evening of Oct. 21st are simply a chronicle of their social activities in the Old Roumanian

restaurant, Lindy's and the Fontainbleu (Schrier 367-9, 398-444, Doyle 462-80). These activities while occupying substantial section of the record, have no relevancy whatever to the charges on trial.

The Events of October 23rd

On this date Santore and Casella came to visit the "ailing" Picini at their motel (sic), the King Cole (Marshall 93-4). The agents paid $5500 to Casella and $1000 to Santore (a 50% compromise of his promised fee for introducing the agents to a "New York connection" (Marshall 94-5, Picini 262-3).

Thereafter, Santore and Casella proceeded to the vicinity of the J&R Flower shop in Philadelphia where they met D'Aria and Massi (Zurlo 744-9).

The Events of December 10th and 11th

After a lapse of almost two months Agent Marshall with Agent Picini came to New York and summoned Santore and Casella to come to the agents' room in the hotel Edison (Marshall 104, Picini 267-8). Agent Picini concocted a story to the effect that they were anticipating a narcotic order from a customer (Marshall 104, Picini 268). The four men then went to dinner at a nearby restaurant (Marshall 104, Picini 268).

During the course of the dinner, Casella left to make a telephone call and upon his return announced that he had "called the connection and he will be here within a short time" (Marshall 104). This connection (Casella conveniently boasted) was the very source of supply "for the people we had gotten the stuff from the last time" (Marshall 105, Picini 273).

At about 9 P.M. the defendant LoPiccolo arrived at the restaurant and held a brief conversation with Casella (Picini 269-70, Marshall 105).

On the following day, Casella was trailed to the building at 233 69th St.—in which LoPiccolo lived—and then to a meeting with Marshall and Picini (Schrier 370). He and Santore, in company with the agents, then wandered off to a moving picture (Schrier 370-1).

During an intermission in the picture, Casella asked Marshall for the key to his hotel room so that it could be furnished to "his people", assuring the agent that his narcotic order would be delivered in his room that night (Marshall 108). Leaving the theatre, Casella unsuccessfully attempted to hail a taxicab and then accepted Marshall's offer to drive him to his destination (109). At 69th Street Casella left Marshall in his car and, followed by another agent, entered the building at 233 E. 69th St. (Marshall 110, Schrier 371). Returning about twenty minutes later, Casella told the agent that a delivery would be made at nine o'clock that night (Marshall 110).

At nine that evening, in a hotel literally swarming with Federal agents, the defendant Ignazio Orlando entered the agents room, remained for a few moments, and left (Schrier 372, Costa 508-11, Dukas 686, Fluhr 821,3).

Once on the street—in a snowy night—Orlando entered a Plymouth automobile in which Lo Piccolo was seated as a passenger (Schrier 372-3, 451-3, Dukas 686-7, Costa 511-2). Trailed by two government cars, Orlando drove to 233 E. 69th street where he entered the garage (Schrier 373). At this juncture LoPiccolo drove off in the Plymouth (Costa 512).

Meanwhile, in their hotel room, the agents Marshall and Picini found a package of narcotics in a bureau drawer (Marshall 110, 113). Six thousand dollars was thereupon paid to Santore (113).

The Events of December 19th

After preliminary discussions among Santore, Casella, and Agents Marshall and Picini (concerning the possibility of some deals in tinned opium), agent Marshall again came to New York. There he was told by Casella that samples of the opium were available "at the connection's house" (Marshall 118). The previously agreed price of $900 was paid by Marshall to Santore and the four men drove to 65th street (Marshall 119). Here Casella and Santore left the car (Marshall 119). The two defendants walked to 233 E. 69th where Casella entered an elevator (shared with him by two Federal agents, Dukas and Murray) and went to the seventh floor (Dukas 688-9, Murray 730-2).

Shortly thereafter Santore returned to the place where agent Marshall was waiting and delivered a package containing a sample of opium (Marshall 119).

The Events of January 20th

At about 6:15 P. M. on January 20th, Agent Coyne was posted on the roof top of a building across from the building at 233 E. 69th street where Lo Piccolo lived (Coyne 835). Through the window of Lo Piccolo's apartment he observed Ignazio Oriando enter the door carrying a brown paper parcel about the size and shape of a bundle of laundry (Coyne 836, 975-8). Shortly, Lo Piccolo entered the apartment (Coyne 836).

At about 7 P. M. Orlando left the building—apparently not carrying any parcel—entered his automobile and drove to 164 Hill street in Elmont, Long Island, the home of his father Lorenzo Orlando (Costa 523, Ward 785, Coyne 836-7).

After a brief interval Ignazio Orlando emerged from the house—this time carrying a package—and drove to a street in the Bronx where he parked his car (Costa 523, Ward 785-6, Coyne 836).

A somewhat complicated series of manœuvers followed which will be only briefly summarized as they do not in any way concern the petitioner Lo Piccolo. In the course of that evening the package was transferred to another car belonging to the defendant Napolitano. Napolitano met with the defendants Tarlentino and Tolentino, returned to his parked car and drove off hotly pursued by government agents (Costa 523-6, Ward 785-93, Coyne 840-50). Eventually Napolitano's car was abandoned in the street and a quantity of heroin removed from the trunk (Ward 791-2).

The Events of January 22nd

Late in the afternoon of January 22nd, Agent Costa observed the defendant Ignazio Orlando leave his home and drive to the vicinity of 71st street and Third Avenue (Costa 855). Shortly, he was joined by Lo Piccolo and the two men drove first to Ignazio Orlando's home and then to 164 Hill Street, the home of Orlando's father (Costa 855). Arriving well after dark, the two men entered the side entrance of the house (Costa 855-6).

In about ten minutes the two men reappeared (Costa 856). Orlando went to his automobile, opened the trunk

and removed a flashlight from the car (Coyne 857). By this light Agent Costa observed the two men pick a package from the ground, place it in the trunk and drive off (Coyne 857).

Agent Coyne who made these observations testified that his observation point was 80 feet from the door of 164 Hill Street (Coyne 979-85, 988). The evening was very dark and the only light was the flashlight held by Orlando, which was pointed at the ground (Coyne 994-1000). (It was apparently the Government's theory that this package was the same package that was delivered in New Jersey to Marshall and Picini the following night. If this was the package, its weight—which according to the agent required the strength of both defendant's to lift into the car—was only thirteen pounds see 1000).

On cross-examination Agent Coyne admitted that in his report regarding his observations that evening, he had not mentioned seeing either Orlando or Lo Piccolo carrying a package or placing it in a car (Coyne 1066). It also developed, and was conceded by the prosecutor, that the point from which Agent Coyne claimed to have made his observation was not 80 feet from Orlando's doorway, but was instead a distance of 314 feet (1196-9, Lo Piccolo Exh's. D, E, F).

The Day of the Defendant's Arrest

On January 23rd the agents conducted various simultaneous operations resulting in the defendant's arrest.

At about 2:00 A.M., Santore arrived at the King Cole motel where he delivered a package of narcotics to Agents Picini and Marshall and was promptly arrested (Marshall 133-5, Bendon 206-8).

At 4:45 A.M., Agents Coyne, Morgan and Charles Ward searched the house at 164 Hill Street and removed a quantity of narcotics from a trunk in the attic (Ward 1141-7, Morgan 1127-31).

At approximately the same time Agents George Ward and Moynihan apprehended Lo Piccolo and took him to his apartment at 233 East 69th Street (Ward 792-3). The agents searched the apartment but found no narcotics (Ward 793-5). Questioned after his arrest Lo Piccolo denied knowing Ignazio Orlando (Ward 795).

The Defendant's Case

The petitioner Lo Piccolo did not take the stand. He rested and moved for a judgment of acquittal at the close of the Government's case.

Nine witnesses including the defendant Santore testified in behalf of the other defendants. The testimony of Santore is of particular significance on this petition.

Santore's defense was one of entrapment. His testimony in large part corroborated the testimony of Marshall and Picini since he related how at the agent's urging, he had participated in the procurement of narcotics through Valle (Santore 1130-6); had assisted in another purchase through Malfi (id., 1338-53); and delivered narcotics to the agents at the King Cole Motel (Santore 1353-69). Santore also testified that he introduced the agents to Casella, that Casella arranged for the delivery of narcotics in New York, that a delivery of narcotics was made to the agent's hotel room, that a sample of opium was obtained through a man Santore met at 233 East 69th Street, and to various other transactions with Marshall and Picini similar to those described by the agents (Santore 1369-1431).

ARGUMENT

POINT I

The evidence against petitioner was insufficient to justify a conclusion beyond a reasonable doubt that petitioner was engaged in a conspiracy to violate the Narcotic Laws of the United States.

For the purpose of this appeal we accept as true all of the testimony of the Government's witnesses and subscribe to that evidence the maximum force which can be attributed to it. Viewed in this light, the Government's proof was, nevertheless, wholly insufficient to establish the guilt of the defendant Lo Piccolo either with respect to the conspiracy or the substantive count.

The evidence respecting Lo Piccolo may be divided into five categories. First, there was testimony of Federal agents regarding their surveillance of Lo Piccolo. Second, there was testimony that certain of the defendants went to the apartment house in which Lo Piccolo lived, at or near the time when narcotic transactions were in progress. Third, there was testimony regarding a statement made by a co-defendant, during the time when the conspiracy was allegedly in existence which tended to depict Lo Piccolo as being a narcotic "connection". Fourth, there was a post-conspiracy statement made by a co-defendant, after his arrest, which was susceptible—although only indirectly—of an incriminating inference. Fifth, there was a post-conspiracy statement attributed to Lo Piccolo himself which was exculpatory but which—if viewed as false—could be taken to betoken consciousness of guilt.

It is axiomatic that a defendant's membership in a conspiracy must be proven entirely through testimony regarding that defendant's own acts (*Glasser* v. *United States*, 315 U. S. 60, 74; *United States* v. *Russano*, 2 Cir. 1958, 257 F. 2d 712).

Of the five categories of proof concerning Lo Piccolo, only the first concerned acts of Lo Piccolo himself. The fifth category proof (a post-conspiracy statement of Lo Piccolo) might possibly be considered a verbal act as well. The evidence in the second category was not relevant on the issue of Lo Piccolo's participation in the conspiracy since it consisted of testimony regarding the activities of other defendants outside of Lo Piccolo's presence. The third category evidence (a statement made by a co-conspirator not in Lo Piccolo's presence) could not become admissible against Lo Piccolo until his participation in the conspiracy was independently proven. The proof in the fourth category (a co-defendant's post-conspiracy statement) was never admissible against Lo Piccolo for any purpose.

We pass now to a consideration of the first and fifth category proof; the only proof properly bearing on the all-important issue, "Was the defendant Lo Piccolo's participation in the conspiracy proven beyond a reasonable doubt?" Such an analysis must be made before that question can be answered:

> "• • • bearing in mind that their participation in the conspiracy can be established only by proof, properly admitted into evidence, of their own words and deeds."
>
> *Russano* v. *United States*, 257 F. 2d 712.

Stripped, as it must be, of the proof not properly bearing on that issue; the total proof regarding Lo Piccolo's membership in the conspiracy was the following:

On December 10th, Lo Piccolo walked into the Vesuvio restaurant and conversed for a few minutes with the defendant Cassella (105, 269-70). On December 11th Lo Piccolo rode in a car from the Edison Hotel to his own home on 69th Street with the defendant Ignazio Orlando (372-3, 451-3, 686-7). On January 20th, Lo Piccolo entered his own apartment, which Orlando had previously also entered, walked to the window and drew down the blinds (835-6, 975-8). On January 22nd, Lo Piccolo entered Ignazio Orlando's car and drove with him to his home. Shortly, the two men drove to Lorenzo Orlando's house, entered the house and emerging a while later placed a package in Orlando's car (855-6, 979-88, 1066, 1196-9). That on the day of his arrest, Lo Piccolo had in his apartment $1200 dollars in cash and denied knowing Orlando (792-5). That at the time of his arrest there was found in Lo Piccolo's overcoat a road map of New Jersey with the words "Black Horse" on the reverse side.

This is the entire testimony regarding Lo Piccolo's own acts or declarations and we challenge the Government to say that there is more. Indeed, we think it likely that in an attempt to spell out some kind of a conspiracy case against Lo Piccolo, the Government in effect asks this Court to view the evidence that we have stated with respect to Lo Piccolo, in the light of the evidence regarding the activities of the other defendants and the statements made by them. This is precisely what the law forbids, for to do so is to give a sinister cast to the defendant's activities by

utilizing evidence of other people's conduct not admissible against Lo Piccolo until his complicity has been shown independent of that evidence (*Glasser* v. *United States*, 315 U. S. 60, 74; *May* v. *United States*, 175 F. 2d 994; *United States* v. *Russano*, 257 F. 2d 712).

Considering the proof regarding Lo Piccolo as it should be considered—independent of the hearsay evidence later admitted against him on the mistaken theory that his complicity had been independently proven—there is no proof whatever against him other than that he knew two of his co-defendants and associated with one of them.

Lo Piccolo had a short conversation with Cassella but for all that appears in the record it may have concerned an investment in American Tel. and Tel. or a venture in the button market. Lo Piccolo came into an apartment shortly after Orlando, who was carrying a package the size, color and shape of a laundry bundle, but in all of the testimony there is no evidence of what the package contained. Lo Piccolo helped to carry a package from the house of Orlando but the package was never identified, recovered or opened. Lo Piccolo drove with Orlando from a hotel to his home but there is not a scintilla of evidence that he knew the purpose of Orlando's visit to the hotel.

In months of careful and assiduous work the Government agents were unable to develop one single shred of direct evidence linking Lo Piccolo to any traffic in narcotics. In reading the record in the instant case from the standpoint of its weight against Lo Piccolo one cannot fail to be struck by the similarity between the proof in the case at bar and that in *Panci* v. *United States*, 5 Cir. 1958, 256 F. 2d 305

and other cases of similar import in which much stronger cases than that against Lo Piccolo have been struck down as a matter of law. The *Panci* case, indeed, deserves detailed consideration.

In that case, as in this, the defendant Panci was charged both with a substantive narcotic offense and with conspiracy. Agents testified that they saw Panci talk to another defendant Giardina (identical to the Vesuvio Restaurant incident in this case). They saw Giardina and Panci in a luncheonette and saw Panci surreptitiously slip a brown paper bag to Giardina (an evidentiary fact much more potent than Lo Piccolo's assisting another defendant to place a package in a car). Thereafter, an agent made a direct purchase from Giardina of heroin which was removed by the seller from just such a brown paper bag (a circumstance more compelling than Orlando's delivery at the Hotel Edison).

Everything that the court said in the *Panci* case is completely apposite in the case at bar. The Court of Appeals noted that the Government had not produced a single witness to testify that he had spoken with the defendant; that no witness had testified that the defendant ever purchased heroin, no one had seen anyone purchase from him; that he was never seen to sell or deliver anything known by him to be heroin; that he was not apprehended with any heroin in his possession; and that he was never shown to have any marked money.*

* Although it does not appear from the record it may be safely surmised that the money paid for narcotics in this case was marked by the agents and that the money found in Lo Piccolo's apartment was not marked.

In commenting upon the evidence adduced against Panci and in reversing his conviction the Court's summary can well bear repetition here (256 F. 2d at p. 312):

> "What is important here is that no one testified that the brown paper bag given Giardina had narcotics in it when it was given to him. In short, the testimony of the government agent that Giardina was seen with Panci and that Panci passed a paper bag to him was wholly insufficient to establish his guilt. While, therefore, the testimony of the government witness well served its purpose of smearing Panci because he was seen associating with Giardina, no evidence whatever was offered to support the claim that Giardina or anyone else obtained heroin from Panci."

The applicability of these succinctly stated principles to the instant case requires no further discussion.

We have till now concerned ourselves primarily with those aspects of the case dealing with the absence of the independent proof of Lo Piccolo's implication in the alleged conspiracy. But one may go further. For it is crystal clear that even assuming *arguendo* that a sufficient basis was laid for declaring all the "conspiracy" evidence admissible against Lo Piccolo, no case was established sufficient to prove his guilt beyond a reasonable doubt.

Viewed in the light of the "conspiracy" testimony, it would then appear that a narcotic business, in which Lo Piccolo's associate Orlando figured, was being conducted. Orlando apparently had access to Lo Piccolo's apartment and one other defendant came to the apartment at about the time that two narcotic transactions took place. In addition, Lo Piccolo was seen helping to carry a package with Orlando the night before a narcotic sale took place.

These circumstances are concededly suggestive. But there is no evidence that Lo Piccolo knew that Orlando was delivering narcotics to the Hotel Edison on the night of December 11th, nor is there any proof that the other defendant who went to Lo Piccolo's apartment met him there or that Lo Piccolo was even at home (see *e.g. Thomas* v. *United States*, 239 F. 2d 7). And with respect to the package carried with Orlando from his father's house on January 22nd, there is no evidence that it contained narcotics, or if by pure surmise it did, that Lo Piccolo knew its contents.

In summary, the case against Lo Piccolo is wholly circumstantial. It rests upon the fact of mere association with other defendants, upon a fertile surmise and upon suspicious proximity. When the Government rests upon such proof, the circumstances should not be equivocal but should lead compellingly and convincingly to a conclusion of guilt. The defendant has been sentenced to twenty years imprisonment as a result of a set of circumstances subject to an inference of complete innocence or even to an inference of some clandestine or illegal activity wholly different from that charged in the indictment.

Such a conviction should not be permitted to stand (*Pauci* v. *United States*, 256 F. 2d 308; *Thomas* v. *United States*, 239 F. 2d 7; *Cleaver* v. *United States*, 238 F. 2d 766; *Eng Jung* v. *United States*, 46 F. 2d 66; *United States* v. *Bonazi*, 94 F. 2d 570; *United States* v. *Zouli*, 137 F. 2d 845, 847).

There is one further point which requires a reversal of the conspiracy conviction. Taking the evidence in its most unfavorable light and adding a liberal dose of guesswork and speculation it might be apprehended—the Government

has claimed—that Lo Piccolo acted as a supplier of narcotics to Orlando and possibly through Orlando to Casella. But even if he were a seller of narcotics to these men, the particular conspiracy charged in the indictment would not be established. As far as this record goes, at least half of the defendants were totally unconnected to Lo Piccolo. Assuming *arguendo* that he supplied narcotics to Orlando or even to Casella, his participation was at an end. There is not a scintilla of proof tending to show that he knew D'Aria, Massi, Tolentino, Tarlentino, Narducci or Napolitano; that he knew any narcotics were passing to them or that he had any interest financial or otherwise in any activities they may have been carrying on. Assuming the worst, that Lo Piccolo supplied Orlando one must search in vain for any evidence that he knew or cared whether they were then peddled on the street corner or in turn passed on to someone else. In that state of the record the conviction cannot stand. As was aptly stated by this court in a similar situation (*United States* v. *Peoni*, 100 F. 2d 401, 403):

> "Assuming that Peoni and Regno agreed that Regno should have possession of the (counterfeit) bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imports a concert of purpose and again Peoni had no concern with the bills after Regno paid for them."

We must call to this Honorable Court's attention the comment of the Court below in reversing Lo Piccolo's conviction on Count 2, the sale count of the indictment:

> "But, as there was no evidence to show that Lo Piccolo knew that any of the drugs with which he or his

> fellow conspirators dealt, were contraband, we can sustain his convictions only if we can find that he had possession of the drugs. The record fails to establish that Lo Piccolo ever possessed heroin as early as December 11, 1957, physically, or by controlling the disposition of it, or otherwise. The drugs sold on that date were delivered to the agents' room by Ignazio Orlando. While it is quite likely that Orlando got the room key from Lo Piccolo there is no evidence tending to show that he also obtained the heroin from him. Similarly, there is no evidence tending to establish that, with respect to the heroin sold on December 11, Lo Piccolo had that type of control which we have seen was exercised by the defendants Casella, D'Aria and Massi. Consequently, his conviction on Count Two must be reversed." (Page 22a Opinion Circuit Court of Appeals)

It is further significant to note that Lo Piccolo's involvement in the conspiracy is based merely on the Circuit Court's finding as follows:

> "Lo Piccolo's involvement, demonstrated first by the evidence that he was engaged in the conspiracy, is overwhelmingly established when the hearsay references to Casella to his 'connection' and 'supplier', which then became admissible against Lo Piccolo, are considered."

Since the decision in this case is at variance with other decisions of other courts of appeal of other circuits, such as the case of *Panci* v. *United States*, 5 Cir. 1958, 256 Fed. 2d 308 (discussed above), this Court should grant this petition.

POINT II

Petitioner was denied due process by the trial court's failure to make available to defense counsel grand jury testimony by Government witnesses.

The Government's case against Lo Piccolo rested entirely upon the testimony of Federal agents regarding their surveillance of Lo Piccolo on December 11th for one or two minutes, on December 19th for fifteen or twenty minutes, on January 20th for a few seconds, and on January 22nd for several minutes during the hours between 4 P.M. and 9 P.M.

This was, moreover, a case on which the Government agents had worked for nearly a year and on which they had spent thousands of dollars of Government funds. There can be little question that they were witnesses who were vitally interested in the outcome of the trial. Since the defendant faced a prison term of twenty years because of their testimony, since they were interested witnesses, and most important since the only means of defense available to combat such testimony was through cross-examination; the defendant was entitled to every opportunity to test the agents' testimony.

To assist in their cross-examination, defense counsel repeatedly requested that they be allowed to see and to utilize the agents' grand jury testimony.

The trial court denied each such request, and refused even to read the minutes for the purpose of determining whether there were any inconsistencies between the trial and the grand jury testimony.

The defendants sought the production of the grand jury minutes after meeting the requirements for production of such documents (*Gordon* v. *United States*, *supra*) for a purpose concededly proper (*United States* v. *Procter and Gamble Co.*, 356 U. S. 677; *United States* v. *H. J. K. Theatre Corp.*, *supra*), invoking a power specifically granted to the trial court to meet just such situations (Federal Rules of Criminal Procedure, Rule 6e).

To have denied the defendants' access to the grand jury minutes was to deny them due process of law.

Since the trial judge in the case at bar was also the trier of the facts, defense counsel was naturally reluctant to have the judge below read the full grand jury minutes, which might well contain prejudicial testimony not admissible at the trial and possibly unrelated to the witnesses' trial testimony. Nevertheless, when the trial court refused to make the minutes available under the *Jencks* rule, defense counsel requested that the court read the minutes to determine whether any inconsistencies appeared between the trial and grand jury testimony. This request was refused.

Under the circumstances of the instant case, in which everything depended upon the credibility of these witnesses, and in which the defendant faced the most drastic punishment, such a denial was reversible error.

The Court below has previously considered the propriety of requests to the trial court to search grand jury minutes for inconsistency, and has, in the *Alper* and *H. J. K.* cases, enunciated certain rules with respect to such requests (1946, 156 F. 2d 222; 1956, 236 F. 2d 802). These rules

have, however, not removed all confusion from the minds of defense counsel and—we believe it may be fairly stated—have not resulted in a uniform practice among the district court judges.

In the *Alper* case the Court acknowledged the propriety of making grand jury minutes available for use on cross-examination provided that the minutes were inconsistent with the same witness' trial testimony. It said, however, that the trial judge was not obliged to read the minutes in all cases. Factors to be considered in making the decision—whether or not to read the minutes—were the timeliness of the request, the trial delay which might result, and the burden imposed upon the judge (156 F. 2d at p. 226).

It was suggested that where the grand jury testimony was short and easy to comprehend the judge should read the minutes but that he might refuse to do so if they were lengthy. The *Alper* case makes no suggestion that any foundation need be laid to support the request.

The *Alper* rules—which are the least favorable to the defense—were clearly met by the defendant Lo Piccolo in the case at bar.

His request was certainly timely for it was made after the very first witness had testified, the earliest opportunity at which it could have been advanced with any likelihood of success. There was little or no possibility that the request would have delayed the trial. The case was a non-jury case, the trial lasted several weeks and it is difficult to imagine that a reading of the grand jury minutes could have required more than a few hours (all of the trial witnesses had not testified before the grand jury and there

was, of course, no cross-examination to be considered). For similar reasons the burden on the judge—considering the importance of the case—would not appear to be very great. Moreover any burden, however slight, could have been lessened materially had the prosecutor followed the sensible suggestion made by this Court in the *Spangelet* case and pointed out to the trial judge the possible areas of inconsistency.

Ten years after the *Alper* decision, this Court in the *H. J. K.* case properly declared that a defendant "*must* be permitted to use the contradictory grand jury testimony to impeach the witness." It stated that the proper procedure was for the trial court to read the grand jury minutes to determine if they were contradictory. Again no suggestion was made that any extensive foundation for such a request be laid. Nor did the court indicate that the trial judge could, as a matter of discretion, refuse to read grand jury minutes when requested to do so.

Clearly the rule of the *H. J. K.* case is correct and the trial court in the instant case erred in its flat refusal to read the grand jury minutes.

In this connection we point out that although neither *Alper* nor *H. J. K.* referred to any foundation for such requests, a foundation for production of documents is always sufficiently laid when the existence and relevance of the documents sought is shown (see discussion of *Gordon v. United States*, at 353 U. S. p. 666). That the documents sought existed, was established at the trial by the agents' testimony that they had been witnesses before the grand jury. That the documents were relevant, was established

by the identity of subject matter in the trial and grand jury testimony.

We do not overlook the fact that the Court below by way of dictum in *Spangelet* stated that (258 F. 2d 338):

> "We think . . . that some reason must be shown by the defendant to entitle him to inspect the minutes of the grand jury testimony of a government witness. However, it is now abundantly clear that a defendant's access to the grand jury minutes does not depend on a showing that the witness' testimony was inconsistent with that he gave before the grand jury."

We must confess that we are left somewhat in the dark concerning the "reason" that should be shown to entitle a defendant to inspect the minutes. No such "reason" is referred to in the earlier cases nor is any reason required by the Supreme Court to support similar requests for the *Jencks* type documents. It is, indeed, difficult to see just what showing a defendant could reasonably be expected to make, except for the minuscule number of cases—rarer than the proverbial dodo bird—in which a witness admits at the trial that he had previously testified contrariwise in the grand jury.

In any event, if "reason" be required, it existed in this case. The agents' testimony was crucial. Their statements regarding the defendant Lo Piccolo were shown to be in some respects demonstrably incorrect (compare 979-85, 988 with 1196-9) and the story of their observations of Lo Piccolo—made under the most unfavorable conditions—warranted the most searching and complete cross-examination before being adjudged sufficiently weighty to condemn a man to twenty years imprisonment.

When this Court in *Spangelet* stated that a "reason" must appear before the minutes were turned over to a defendant it did not—we think—mean that a reason must be shown to warrant a reading by the court. On such reading the "reason" for turning the minutes over to the defendant will appear.

In passing, it should perhaps be mentioned that at the trial the Government opposed the defendants' application upon the ground that the grand jury minutes had not been translated from stenographic into written form. We think that any such argument is wholly specious and will merit little consideration if advanced in this court.

If the circumstance that grand jury minutes have not been transcribed can balk a defendant from utilizing them then the Government has it always within its power to keep grand jury minutes secret—despite the provisions of Rule 6e of the Rules of Criminal Procedure—by the simple expedient of directing that they should not be typewritten. There is no difference between documents that are written in shorthand and documents written, for example, in Chinese. Both are unintelligible in their original state, if one cannot read shorthand or decipher the language of the Orient. But no one would suggest that the Chinese document cannot be used on that account nor should the defendants' be penalized because a translation from shorthand to comprehensible English is necessary to put the document into usable form. Of course, a different situation is presented where no grand jury minutes are kept. In that event the defendant cannot have the benefit of the prior testimony simply because it does not exist and the production of a nonexistent document can hardly be re-

quired. But in a jurisdiction where grand jury minutes are habitually recorded it would ill become the prosecutor to claim that they may be used by the Government—as they frequently are—in those cases in which the Government intends to use them and therefore has them transcribed, and withhold from the defendant in a case in which the Government does not need the minutes by the simple expedient of keeping them in shorthand form.

We recognize the prosecutor's legitimate interest in the punishment of wrongdoers, and perhaps particularly in cases involving narcotics, but the cause of justice is not served by adopting technical positions to shield Government witnesses from cross-examinations.

The Circuit Court recognized that the Trial Court committed error in refusing the timely request of counsel to direct the United States Attorney to cause the Grand Jury minutes to be transcribed and furnished to the Court so that the Court could read said Grand Jury minutes to see whether or not inconsistencies existed, and whether or not defense counsel could use said Grand Jury minutes in cross-examination. Recognizing this error, months after the trial and while a decision on the appeal was pending in the Circuit Court, the Circuit Court directed that the Grand Jury minutes be transcribed and be submitted to the Trial Court to report whether or not in his judgment there were inconsistencies in the testimony of witnesses who testified before the Grand Jury and at the trial to warrant turning over to the defendants those portions of the Grand Jury minutes in which inconsistencies appeared; and if there were such inconsistencies whether in his judgment the failure to turn over these portions containing them prejudiced the defense. The Court below certified as follows:

"Any inconsistencies that exist between the testimony of those witnesses who testified both before the Grand Jury and at the trial are of such a minor nature that I would not have ordered that they be delivered to defense counsel. I further certify that in my judgment the defense was in no way prejudiced by my refusal to order that they be surrendered to them."

It is difficult to understand how the Court below, many months after trial, without a transcript of the trial minutes before it, could in retrospect say counsel was not entitled to Grand Jury minutes for purposes of cross-examination. It is interesting to note that after the instant case was decided, the same Circuit in the cases of *United States* v. *Zborowski* (unreported, decided Second Circuit October 6, 1959); and *United States* v. *McKeever and Morrison* (unreported, decided Second Circuit November 10, 1959), reversed convictions where the Trial Court refused to read the Grand Jury minutes to determine whether or not inconsistencies existed, and whether or not said minutes should be turned over to defense counsel for purposes of cross-examination. The Court in that case did not ask the Trial Court to certify whether any inconsistencies existed, but reversed the convictions on those grounds. This was done in said cases because the cases were tried before juries.

It is respectfully submitted that the rule should not be different where the Judge is the trier of the facts as well as the law.

POINT III

Petitioner was denied due process by the improper receipt of evidence against him after he had rested his case.

At the conclusion of the Government's case the defendant Lo Piccolo moved to strike from the record the conspiracy evidence taken subject to connection and for a judgment of acquittal upon the counts of the indictment charging crimes against him (1280-1, 1284-5). These motions were denied (1248-9).

The defendant then rested upon both counts and renewed his motion for a judgment of acquittal at the close of the entire case (1289, 1296). A most peculiar colloquy followed. The prosecutor took the position that Lo Piccolo could not rest his case, frankly stating that he hoped to elicit incriminating testimony regarding Lo Piccolo from other defendants, in the event any of them took the stand (1289-1306). The trial judge ruled that "he has a right to rest" (1305) while at the same time clearly stating that any damaging evidence elicited from the witnesses called by the other defendants "would be binding on Mr. Lo Piccolo even though he had rested" (1301) and that "evidence of wrongdoing on the part of Mr. Lo Piccolo cannot be thwarted by his coming in and resting at the close of the Government's case" (1306). The court, therefore, refused to rule on Lo Piccolo's motions for judgment.

Thereafter, of course, the defendants Santore and Massi took the stand. Their extensive testimony while self exculpatory actually testified, on numerous particulars, to confirm the testimony of the Government witnesses.

The trial court's ruling that testimony elicited from defense witnesses, after Lo Piccolo had rested, could be utilized in determining his guilt was erroneous and prejudicial.

Nothing is more familiar or more basic than the order of trial followed in all courts in criminal cases. It requires the Government to sustain its burden of proof by presenting the evidence in support of its charges. When the Government has done so, the defendant may go forward with his proof. But if he does not wish to offer evidence and elects instead to rest, the taking of testimony is concluded and the Government is precluded from offering further proof.

That is what Lo Piccolo wished to do in this case. It is respectfully submitted that neither the Court nor the prosecutor could keep the defendant from resting once the Government's case was over. If Lo Piccolo had been tried alone there would be no question that that was his right. We can perceive no reason why—simply because the prosecutor elected to try him with other defendants—he should be deprived of that right and the Government be allowed to speculate upon the happy chance that damaging testimony would be elicited thereafter.

The Government had every opportunity to present all of its proof and having done so is not entitled to a second bite of the apple. In this case they got a second and giant bite under a ruling of the court that the testimony of Santore and the other witnesses could be used against Lo Piccolo.

Certainly in a non jury case there is little or no reason why judgment should not have been rendered promptly, before the trier of the fact heard the inadmissible and

prejudicial testimony of the remaining witnesses (see e.g. *State* v. *Underwood*, 57 Mo. 40, 48; 1 Bish. Crim. Proc. 962). Or if the court wished to delay the judgment and render all decisions together it should have been with the clear understanding that the remaining proof could have no effect upon the status of Lo Piccolo.

We must confess that authority upon this point is apparently non-existent. However, we point out that not many years ago when the shoe was upon the other foot and the prosecutor apparently feared that the defense testimony might be of assistance to a defendant who had rested, the United States Attorney for the Southern District urged upon the trial court in *United States* v. *Lawn* (232 F. 2d 589), the position contended for by Lo Piccolo in the case at bar. Thus the Government wrote in its brief:

> "Government counsel actually sought to obtain an instruction that testimony offered after Lawn rested was not to be considered as to Lawn."

When the case was before the Circuit Court of Appeals the defendant in the *Lawn* case switched positions and asserted as error the ruling that he had sought in the court below. In view of this startling switch in position we attach no significance to the Court's affirmance of the *Lawn* case without discussion of that point.

But it would seem—in the absence of authority—that reason would dictate that a defendant is not required to gamble upon the antagonistic defenses of co-defendants with whom he did not wish to be tried in the first instance. Indeed it appears that the policy enunciated in such cases as *Logan* v. *United States*, 144 U. S. 263 and *Brown* v.

United States, 150 U. S. 93 which frees a defendant of the weight of unauthorized statements of co-defendants should be equally applicable to co-defendants' trial testimony.

It must be pointed out that in announcing his decision with respect to Lo Piccolo's guilt, the trial judge stated that he had not considered any of the defense testimony against Lo Piccolo. But the testimony was prejudicial and was heard by a trier of the fact with an original disposition to apply it to Lo Piccolo. In such circumstances even judges may have difficulty in erasing all prejudicial impact and the defendant should not be required to speculate upon the outcome of these mental gymnastics [*Krulewich* v. *United States*, 336 U. S. 440, 453 (Jackson, *J.*, concurring); *Nash* v. *United States*, 54 F. 2d 1006].

In rejecting this contention, the Court below stated as follows:

> "Joseph Lo Piccolo rested his case at the end of the Government's case. He argues that the district court committed reversible error as to him because it ruled that, though he put in no evidence in support of his cause, evidence damaging to him elicited from defense witnesses called by the other defendants would be binding upon him. We need not pass upon the merits of this contention for, in announcing its decision with respect to those defendants who presented no evidence in their own behalf, the court stated that it found them guilty on the basis of the Government's proof alone. Our study and analysis of the evidence demonstrate to us the accuracy of this observation."

CONCLUSION

The petition for certiorari should be granted and this Court, in the exercise of its powers, should order the judgment of conviction of the petitioner herein on Count No. 5 reversed and the matter remanded to the appropriate court to be dealt with accordingly.

Respectfully submitted,

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